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In The

Supreme Court of the United States

October Term, 1993

JOHN WENTWORTH EVANS,

Petitioner,

vs.

ALEXANDER WEIR, III, BRUCE R. WEIR, CAROL J. ASHMAN AND ALEXANDER WEIR, JR.,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

Justice delayed is justice denied. This petition for a writ was filed almost five years from the day when Respondents commenced their action to remove Petitioner John W. Evans ("Evans") as trustee of the family trusts of which they are beneficiaries. The petition was filed on the last day possible for

this Court to retain jurisdiction. Supreme Court Rule 13.1. The petition represents one last dilatory attempt to prevent Respondents from recovering the money that Petitioner misappropriated as sole trustee of the family trusts.

Petitioner contends he was deprived of due process by the lower court's refusal to grant him a continuance of the trial. Respondent was given a full opportunity to present his defense through counsel of his choice. If counsel was unprepared, there was no showing in the trial court that the fault rested with anyone but Petitioner. California provides ample procedural safeguards for Petitioner to have presented additional evidence to the trial court. Petitioner failed to take advantage of those procedures and cannot now complain of any constitutional error.

COUNTERSTATEMENT OF FACTS

On April 28, 1989, Respondents Alexander Weir, III, Bruce R. Weir and Carol J. Ashman filed their action to remove Petitioner Evans as trustee of the Weir family trusts and for an accounting.[1] Evans filed his response to Respondents' petition, through counsel.

On December 5 and 6, 1989, a hearing was held on Respondents' petition. At the conclusion of the hearing, Evans was removed as trustee of the trusts and the court ordered him to file a trust accounting within ninety days. The matter was then continued to March 15, 1990 for a further hearing on Evans' accounting.

On March 15, 1990, Evans appeared through counsel. After confirming that Evans had not filed the court-ordered accounting,

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1. Alexander Weir, Jr., the father of the trial court petitioners, was the settlor of the trusts but was not a party to the action. He has been named improperly as a Respondent to this Petition.

the court stated that the accounting "should have been filed March 6th." Evans' attorney indicated that an accounting had been prepared but it was not in the proper format. The court responded: "That's not the way you do a court accounting. You might walk across to [room] 258 and talk to one of the probate attorneys and get them to show you how a court accounting looks." The proceedings were then continued to May 3, 1990.

On April 6, 1990, while still represented by counsel, Evans filed his accounting. After further continuances, a hearing was scheduled for June 14, 1990. At 4:22 p.m., on the day before the hearing, Petitioner filed a Chapter 7 bankruptcy petition through retained counsel.

Respondents subsequently filed in the bankruptcy court a complaint to determine non-dischargeability of the debt that was the subject of the state court proceedings. Respondents obtained relief from the automatic bankruptcy stay order to pursue the claim in the state court.

On November 5, 1990, the Superior Court rescheduled the hearing on the trust accounting for February 11 and 12, 1991.

In December 1990, Petitioner's current counsel were retained to represent him in the bankruptcy litigation commenced by Respondents.[2] (Petitioner's Appendix 4, p. 15a). The factual issues in the bankruptcy complaint and the state court proceeding are identical. The legal issues are similar. Petitioner's counsel had more than a month to prepare for a hearing that lasted less than two half-days.

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2. "Respondent" Alexander Weir, Jr. was also a plaintiff in that action on a separate claim for relief. The bankruptcy court severed the two claims and has entered a non-dischargeable judgment in favor of Alexander Weir, Jr. against Petitioner Evans in the amount of $511,351.93 for Evans' intentional fraud. That judgment is currently on appeal to the district court.

On February 7, 1991, Petitioner moved the trial court, *ex parte*, for a 90 day continuance of the trial and submitted a written application in support of his request. Respondents' counsel personally appeared to oppose any continuance. Petitioner's application was denied.

On February 11, 1991, Petitioner (an attorney for more than 15 years) appeared with his co-counsel, Mr. Doyle, and announced that he was prepared to go forward with the hearing. Petitioner, with assistance from Mr. Doyle, examined Alexander Weir, Jr. as a witness, and also testified himself. After less than half a day of testimony, the matter was continued to the afternoon of February 13th. Petitioner and his retained counsel, therefore, had a further day and a half to prepare for the examination of witnesses. At the resumed hearing, Mr. Doyle was allowed to recall the witnesses who had already testified, and he examined them fully.

At the conclusion of the hearing, the court announced its tentative decision. However, a formal judgment was not entered until four months later, on June 17, 1991 (*see* Petitioner's Appendix 1).

Under California's law, a party has until 15 days after notice of entry of a judgment against him within which to make a motion for a new trial based upon "accident or surprise, which ordinary prudence could not have guarded against," or "newly discovered evidence material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." California Code of Civil Procedure, Section 657. Petitioner made no such motion in the trial court.

Petitioner has not, either in his briefs to the Court of Appeal below, his petition for review to the California Supreme Court, nor in his petition to this Court, set forth what material evidence he would have presented (either in the way of witnesses or a further

accounting) that could have changed the result in this case. Notwithstanding Petitioner's contention that the issues were complex, the underlying facts were simple and not seriously disputed. Petitioner received more than $400,000 as trustee of two trusts established for the benefit of Respondents. Until the underlying action was commenced, he had never provided any accounting for the funds he held. When finally compelled to do so, he confessed that all of the money had been lost in a speculative leveraged investment which, by his own admission, was not an appropriate trust investment.

REASONS FOR DENYING THE WRIT

Petitioner has not demonstrated the existence of any special and important reasons justifying review of the Court of Appeal decision. Supreme Court Rule 10.1.

I.

THE COURT OF APPEAL'S DECISION CREATES NO CONFLICT WITH ANY OTHER COURT OR DECISION.

The California Court of Appeal's decision does not create any conflict with any decision of this Court or with the highest court of any other state, and Petitioner does not claim otherwise. As an unpublished decision, the Court of Appeal's opinion cannot be cited as precedent on any issue in any court.

II.

THE DECISION BELOW RESTS UPON THE TRIAL COURT'S PROPER EXERCISE OF ITS POWER AND DISCRETION AND FALLS WELL WITHIN THE BOUNDS OF WELL-ESTABLISHED DUE PROCESS LIMITS. GRANT OF THE PETITION WILL NOT BE OF ANY PRECEDENTIAL VALUE TO FUTURE LITIGANTS.

The trial court's refusal to grant Petitioner a continuance was based upon the specific facts presented to it, and was within the proper exercise of its power and discretion. Petitioner has not demonstrated that the court's ruling was so arbitrary as to deny Petitioner procedural due process.

III.

THE QUESTIONS PRESENTED IN THE PETITION WERE NOT PRESENTED BELOW.

Neither of the questions presented in the petition were raised in the Court of Appeal. Petitioner has not stated any reason why he should be allowed to raise them now.

IV.

ASSUMING, *ARGUENDO*, THAT THE PRINCIPLES OF *UNGAR V. SARAFITE* APPLY TO CIVIL LITIGANTS, PETITIONER HAS NOT DEMONSTRATED THAT HIS DUE PROCESS RIGHTS WERE VIOLATED.

If the due process considerations outlined by this Court in *Ungar v. Sarafite*, 376 U.S. 575, 84 S. Ct. 841 (1963) extend to civil litigants, Petitioner has not demonstrated that he would benefit by their application to this case. In *Ungar*, this Court, after noting that

the "matter of a continuance is traditionally within the discretion of the trial court," stated:

> There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Ibid., 376 U.S. at 589.

Here, Petitioner was given more than three months' notice of the hearing for which he requested a continuance. At the time he requested the continuance, the action had been pending for almost two years and much of the delay had been caused by Petitioner's dilatory tactics. Petitioner was represented by retained counsel, during all critical phases of the pre-trial proceedings, and he was, himself, a practicing attorney. His "newly-retained" counsel (provided by his insurance carrier) had been representing him for at least two months in parallel litigation in bankruptcy court. Petitioner's application for a continuance was silent on the subject of Petitioner's prior efforts to retain counsel or his efforts to secure representation through his insurance carrier. The reasons for the continuance, as expressed in Petitioner's application, were nothing more than general conclusions of his counsel, made without any factual foundation. The trial itself lasted less than two half-days, with a recess of a day and a half between sessions. Petitioner's counsel fully participated in the hearing. Finally, before the trial court entered its judgment against him, Petitioner had a period of at least four months within which to produce any additional evidence he was unable to procure because the continuance was denied. Under all these circumstances, this Court, giving due deference to the trial court's ruling, cannot say that Petitioner was deprived of due process of law.

V.

THE DECISION BELOW IS CORRECT.

The decision below is entirely correct. Petitioner received more than $400,000 as sole trustee of a family trust that he, as an attorney, prepared on behalf of Respondents' parents. When called upon to account for the assets in his care, Petitioner was only able to produce less than $2,000. He admitted that the he had placed the remaining cash in speculative investments that were not authorized by the trust instrument. The Court of Appeal found that none of the issues Petitioner attempted to inject into the trial court proceedings provided any legal excuse for his gross breaches of fiduciary duty, and the trial court's judgment was fully supported by the evidence. Petitioner's failure, in any of his filings, to articulate how a trial continuance would have affected the result confirms that the decision against him was correct.

CONCLUSION

The bankruptcy court hearing Respondents' non-dischargeability complaint against Petitioner is awaiting this Court's decision on the petition before allowing Respondents to proceed with that action. For the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari be summarily denied.

Respectfully submitted,

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